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Thinking Under the Box—Public Choice and Constitutional Law Perspectives on City-Level Environmental Policy

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THINKING *UNDER THE BOX*—PUBLIC CHOICE AND CONSTITUTIONAL LAW PERSPECTIVES ON CITY-LEVEL ENVIRONMENTAL POLICY

HARRI KALIMO* & REID LIFSET** †

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INTRODUCTION

A. *Background*

For nearly two decades, much of environmental policy-making at the federal level in the United States has been paralyzed. Since the Republicans captured both houses of Congress in 1994 and proposed the Contract with America, the Bush presidency in the first decade of the century, and most recently, the notorious Congressional stalemate coinciding with the rise of the Tea Party, national legislative and regulatory action has been conspicuously limited. The absence of federal environmental ambition, however, has led to an opposite development: it has spurred legislative and regulatory activity on subfederal levels of policy-making. Since the 1990s, state level environmental policy has, in many places, been filling the gaps left by U.S. federal authorities.

While state-level environmental policies are relatively well known and researched,¹ a level of government below that—cities—remains less

¹ See, e.g., EVAN J. RINGQUIST, ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION (1993); Matthew Potoski & Neal D. Woods, *Dimensions of State Environmental Policies*, 30 POL. STUD. J. 2, 208 (2002).

well-charted territory. Considering how urbanization has long been the prominent aspect of demographic and economic developments globally, this seems striking.² Most countries' development is significantly driven by one or more metropolitan regions, in which they are connected to by the globalized economy. New York City, Los Angeles, San Jose, and Chicago are leading economic drivers in the United States.³ The phenomenon is in no way limited to the United States of course, with London, Helsinki, Tokyo and Shanghai, for example, acting as engines in their respective national economies.⁴ More broadly, interest in the role of cities as a point of leverage in addressing not just traditional local environmental challenges such as land use, but broader issues such as climate change and sustainability more generally, has mushroomed.⁵ The developments raise the question: can cities also play a role in environmental policy-making? What kind of limitations could the cities face in fulfilling such role?

B. The Research Questions and the Thesis

While an inquiry to the role of cities in environmental policy-making seems salient in practical terms, it also presents us with an intriguing methodological setup. On the one hand, the focus on cities points on the side of policy-making towards the seminal, public choice-based theory of Paul E. Peterson. Peterson famously argued in his book, *City Limits*, that city-level policies are structurally limited to those that further the city's economic development. It seems, however, that there has not been scholarly attempts to assess how that theory of informal economic limits could instruct us in terms of modern environmental policy-making.

On the other hand, from the perspective of law, the development of subnational rules is formally limited by the applicable constitutional provisions. Although the constitutional limits of states have been explored in detail, much less attention has been devoted to the constraints that the American federal system may set on innovative, environmentally progressive cities and municipalities. Our investigation of these formal limitations on city-level environmental policy-making focuses on economic

² Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1100 (2008). In the United States, the urban population has increased from less than 20% in the 1860s to over 80% in 2000. *Id.* at 1103.

³ Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 504–05 (2009).

⁴ *Id.*

⁵ See, e.g., C40 CITIES CLIMATE LEADERSHIP GROUP, <http://www.c40.org/> [<http://perma.cc/6ND4-SNQ3>] (last visited Nov. 12, 2015).

constitutional law. Economic constitutional law refers in this Article to those rules that are quintessential in preventing subfederal jurisdictions from enacting measures that hinder the free interstate movement of goods, services, or capital on a common market. In the constitutional setting of the United States, economic constitutional law in this sense means the Dormant Commerce Clause,⁶ which hence is the focal point of our interest.

Moreover, although the application of public choice theory and constitutional law to sub-state level environmental policy seems interesting separately, it is their *intersection* that is the principal layer of novelty in our analysis. The interrelationship between public choice and law has of course matured into a major strand of research,⁷ and there are scholars that have previously analyzed the links between public choice theory and constitutional law. The analysis has, however, focused on explaining federal and state-level issues: Congressional decision-making, the role of the judiciary in the federal system (in particular the scope of statutory interpretation), or the scope of administrative law (delegation of decision-making to administrative agencies).⁸ Also, where multistate commercial activity,⁹ or the Dormant Commerce Clause more specifically,¹⁰ has been under scrutiny, the approach has been different from the Petersonian, local level angle in this Article. Together, the dual perspective of Peterson's theory of city limits and the constitutional law of the Dormant Commerce Clause can be used as a novel analytical framework to depict the informal and formal limits on city-level environmental policies. Our scrutiny

⁶ U.S. CONST. art. I, § 8, cl. 3.

⁷ DANIELA FARBER & ANNE JOSEPH O'CONNELL, RESEARCH HANDBOOK ON PUBLIC CHOICE AND LAW 1–9 (2010).

⁸ See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1998); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407 (1997); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); George J. Stigler, *The Theory of Economic Regulation*, 2 J. ECON. & MGMT. SCI. 3 (1971).

⁹ See, e.g., RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993) (investigating takings).

¹⁰ See, e.g., Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 421–24 (2009); Ali Badawi, *Unceasing Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 CAL. L. REV. 1331 (2003); Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227 (1995); Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1 (2003).

therefore, also contributes to filling a gap in interdisciplinary research and legal theory. Our research confirms that there are numerous overlaps between the two disciplinary approaches on sub-state level, and that such overlaps are instructive for better understanding the challenges of mitigating environmental impacts. By focusing at the local level, the work thereby complements the public choice and law-based research on the environmental field of, for example, Professor Richard Revesz.¹¹

Our analysis reveals that cities may, in fact, be relatively *unconstrained* in conducting environmental policy at the local level. The limits that public choice and constitutional law impose seem in most respects quite reasonable and sensible, both for the cities themselves as well as their larger federal settings. This is an optimistic conclusion, because it means that even in the current global context of international environmental policy-making, one should not forget to think outside—and more specifically *underneath*—the box. There may be fewer constraints than previously thought for identifying and fully exploiting the potential that exists for a specific environmental policy under the federal and state governments at the city level.

Further, this Article argues that Peterson's theory and constitutional economic law also offer coherent guidance on the long-term prosperity of cities in the global setting. The cities seem likely to remain driven by a focus on economic development policies, which in turn is well aligned with the constitutional efforts to remove discrimination and protectionism in commerce and trade.

C. *City Limits—a Classic Theory of Public Choice and Urban Policy*

The economist Charles Tiebout¹² argued that “the consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.”¹³ In other words, the provision of public goods forms a market. In this market, individuals are rational and self-interested, so an important (but certainly not exclusive) motivation driving

¹¹ Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

¹² Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416 (1956); see also RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* (1959).

¹³ Tiebout, *supra* note 12, at 418.

their behavior is the maximization of utility.¹⁴ In Tiebout's account, residents seek communities with the highest ratio of benefits (services) to costs (taxes)—“they vote with their feet.”¹⁵ The public authorities (i.e., local governments) compete for the economic resources of the utility-seeking individuals: tax-paying residents and companies. Peterson's *City Limits*¹⁶ is perhaps the most influential extension of Tiebout's theory. Peterson applied Tiebout's approach to characterize the forces that shape the provision and politics of municipal goods and services. Peterson claimed that because of such intercity competition for economic resources, the cities must inevitably pursue policies that focus on economic development.¹⁷ The market for public goods thus is the factor that predominantly (yet not exclusively) explains the policies that cities choose to follow. Even if one did not agree with Peterson's conclusions, his theory, like many public choice approaches, seems useful as an analytical method to further understand the “how” in policy-making—in this case, how the local level environmental policies may or may not be constrained.¹⁸

The political-economic context and the scholarship on public choice and urban public policy have obviously evolved since Peterson's book was written in 1981. Peterson's structurally deterministic theses have also received considerable criticism, and his focus on economic development as the factor explaining city policies has been questioned. Alternative

¹⁴ There is considerable debate amongst the public choice scholars about the theory even at this fundamental level. See, e.g., MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 243–95 (2009) (explaining the separate traditions). The right wing Chicago tradition is according to them concerned over the legislative market failure. Due to skepticism about the statutory self-interest of the legislator (along “the Wilson-Hayes model”), they argue that the judiciary should interpret legislation narrowly. The left wing, institutionalist tradition of Virginia reflects more the “Legal Process School” work developed by Henry M. Hart and Albert M. Sacks, whereby the legislative bargaining process and judiciary are primarily motivated by the public interest (i.e., the common good). The Chicago tradition includes scholars and/or judges such as Frank Easterbrook, Jonathan Macey, Richard Posner, and Kenneth Shepsle. Stearns and Zywicki associate the Virginia tradition with (for example) Daniel Farber, Philip Frickey, William Eskridge, and Einer Elhauge.

One may also note that “public choice” as a field is described by different names and consists various subtheories, such as interest group theory, rational choice theory, game theory, social choice theory as well as various applications of behavioral theory.

¹⁵ Tiebout, *supra* note 12, at 418.

¹⁶ See PAUL E. PETERSON, CITY LIMITS (1981).

¹⁷ *Id.* at 18–19.

¹⁸ Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON L. REV. 921, 951 (1998); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 99–100 (2000).

explanations of city behavior have been observed¹⁹ to vary from the earlier theories on community power elite,²⁰ pluralist interests,²¹ and growth machine interests,²² to later studies on regime analyses²³ and interest group coalitions,²⁴ as well as professional bureaucrats,²⁵ and elected officials.²⁶ The criticism does not nonetheless alter the fact that Peterson's book remains a seminal contribution, and there are many scholars who still attest to its main findings.²⁷ It is obvious that public choice theory, as any other model or theory, has its strengths and weaknesses, and this Article does not assess the validity of Peterson's theory as such. Rather, we believe (and experienced empirically) that when used critically, it still makes for an interesting, previously unexplored analytical framework to enrich insights in the area of our research: environmental policy and law.

D. *The Constitutional Model of Regulatory Competition*

Tiebout's analysis has intriguing parallels in the legal sphere with what may be titled the constitutional models, that is, with overarching conceptions of how constitutional law should be fashioned or interpreted, in this context, with respect to trade and commerce.

In the constitutional model of *regulatory competition*,²⁸ the individual lower-level governments (local governments²⁹ within states, states

¹⁹ Victoria Basolo & Chihyen Huang, *Cities and Economic Development—Does the City Limits Story Still Apply?*, 15 *ECON. DEV. Q.* 327 (2001).

²⁰ See, e.g., FLOYD HUNTER, *COMMUNITY POWER STRUCTURE* (1953); M. KENT JENNINGS, *COMMUNITY INFLUENTIALS* (1964); and NELSON POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* (1963).

²¹ See, e.g., ROBERT A. DAHL, *WHO GOVERNS?* (1961); AARON WILDAVSKY, *LEADERSHIP IN A SMALL TOWN* (1964).

²² See, e.g., Harvey Molotch, *The City as a Growth Machine*, 82 *AM. J. OF SOC.* 309 (1976).

²³ See, e.g., MICHAEL KEATING, *COMPARATIVE URBAN POLITICS: POWER AND THE CITY IN THE UNITED STATES, CANADA, BRITAIN AND FRANCE* (1991).

²⁴ See, e.g., TERRY N. CLARK & LORNA C. FERGUSON, *CITY MONEY: POLITICAL PROCESSES, FISCAL STRAIN, AND RETRENCHMENT* (1983).

²⁵ See, e.g., Lynn M. Appleton & Terry N. Clark, *Coping in American Cities: Fiscal Austerity and Urban Innovations in the 1980s*, in *URBAN INNOVATION AND AUTONOMY* 31 (Susan E. Clarke ed., 1989).

²⁶ See, e.g., Thomas Longoria Jr., *Empirical Analysis of the City Limits Typology*, 30 *URB. AFF. REV.* 102 (1994); Martin Saiz, *Mayoral Perceptions of Developmental and Redistributive Policies: A Cross-National Perspective*, 34 *URB. AFF. REV.* 820 (1999).

²⁷ Schragger, *supra* note 3, at 489.

²⁸ Note that the term *regulatory competition* is in no way linked with *competition* (antitrust) law.

²⁹ In this Article, the terms city, municipality and local government are used interchangeably. In other contexts, these distinctions may be important.

within federations) are largely self-determinant in terms of law-making.³⁰ They are constitutionally empowered to define the laws and policies within their jurisdictions in specific areas such as environmental protection.³¹ In full-blown regulatory competition, no common uniform legislation exists, save for the general, systemic rules of the higher level constitution(s).³² In line with Tiebout's idea of a public goods market, the lower-level jurisdictions set up legal systems that are as inviting as possible to various groups of stakeholders (consumers, producers, merchants, etc.).³³ The legal systems enter into a "regulatory competition" for the resources that such stakeholders represent or provide.³⁴ Such competition can drive the substantive standards either upwards (race to the top) or downwards (race to the bottom), depending on the preferences of the stakeholders and the mobility of the resources in question.³⁵ This is in essence also what Tiebout and Peterson are claiming.

The alternative to the constitutional model of regulatory competition is harmonization.³⁶ In the harmonization model, the hierarchically higher level government sets a common standard for the lower levels of government.³⁷ The common standard, in this view, may increase aggregate welfare beyond what can be achieved through the varying levels of the decentralized regulatory competition approach.³⁸ In the United States, harmonization can be achieved through federal legislation.

The proponents of the regulatory competition approach argue for a wide autonomy for the individual, lower level units of government. For them, harmonization³⁹ beyond the mere leveling of the playing field is unwarranted paternalism, whereby particular policies, such as state level environmental protection measures, are forced upon an unwilling minority of states and/or municipalities without any tangible benefits.⁴⁰ Regulatory

³⁰ Tiebout, *supra* note 12, at 418.

³¹ *Id.* at 419–20.

³² See PETERSON, *supra* note 16, at 18.

³³ Tiebout, *supra* note 12, at 420–21.

³⁴ Daniel C. Esty & Damien Geradin, *Regulatory Co-opetition*, 30 J. INT'L ECON. L. 235, 252 (2000).

³⁵ See, e.g., PETERSON, *supra* note 16, at 18–20.

³⁶ Esty & Geradin, *supra* note 34, at 235–36.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See discussion *infra* Introduction. There are also many kinds of combinations of the "regulatory competition" and "harmonization" models. A society's choice of a particular constitutional model should aim at optimizing its ability to reach the desired societal objectives.

⁴⁰ Robert E. Hudec, *Differences in National Environmental Standards: the Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1, 7–8 (1996).

competition entails a libertarian view on innovation, as well as sensitivity to local diversity.⁴¹ Local communities can be seen as the laboratories of democracy that engage in novel social experiments, just as Justice Brandeis observed states to be already doing in the 1930s.⁴²

If states seemed like the laboratories of democracy in the United States of the 1930s,⁴³ it would appear that the ubiquity of information and the ensuing small-scale empowerment has expanded the notion to local authorities: considerable regulatory experimentation on complicated matters may take place in the local level administrations. The information flow enables better use to be made of such innovative experimentation. The positive impacts of green roof standards on greenhouse gas emissions, energy efficiency, and local air and noise pollution in the German city of Stuttgart quickly finds applications in New York, Vancouver, and beyond.⁴⁴

Regulatory experimentation by local authorities can provide the basis for effective legislation.⁴⁵ Effective legislation, then again, translates into welfare gains, which can potentially be multiplied if the innovative legislation can be applied on the level of the higher governance or replicated in other jurisdictions.⁴⁶ As noted, the regulatory competition strand of constitutional law theory appears to resonate well with the theories of Tiebout and Peterson in explaining the structure and objectives of local governance. The constitution must grant local authorities power to regulate; otherwise, they cannot engage in the regulatory competition. The views on the appropriate grant of powers can reflect one's degree of libertarian/federalist principles or, more pragmatically, the effectiveness of the available policy solutions. It would therefore seem useful to explore further parallels between public choice theory and the surrounding constitutional legal framework.

⁴¹ Here, even traces of the *Cooley* doctrine's legacy may be noticed. In *Cooley v. Board of Wardens*, the Supreme Court proclaimed that state actions should be judged in the light of their constitutional desirability to permit diverse regulatory responses to local needs. *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851). Reversely, the state rules were determined constitutionally undesirable on issues of federal scope, such as interstate commerce. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1048 (3rd ed. 2000).

⁴² *New State Ice Co.*, 285 U.S. at 311 (1932) (Brandeis, J., dissenting).

⁴³ See *id.*

⁴⁴ Marit Vestvik, *Green Roofs*, NAT'L INST. FOR CONSUMER RESEARCH (SIFO), available at <http://scp-knowledge.eu/og/housing-workshop-documentation> [<http://perma.cc/5T3R-W6MG>].

⁴⁵ Esty & Geradin, *supra* note 34, at 239.

⁴⁶ Douglas T. Kendall, *Federalism as a Neutral Principle*, in *REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM"* 21, 24–25 (Douglas T. Kendall ed., 2004).

E. City-Level Environmental Law and Policy

Cities and municipalities in the United States may be active in many areas of policy-making. This is a consequence of the federal constitutional structure of the country, which allows for local regulatory actions to the extent that such actions have not been specifically precluded through constitutional or statutory preemption. This allows development of state and local policies, where on the federal level, conservative tendencies may stifle action. A particularly conspicuous example in this respect is environmental policy, where active policy-making on the subfederal level has been compensating for the lack of progressive environmental policies in many fields.

In fact, the reasons for local level environmental policy are, as will be shortly explained, precisely what the public choice theory would presume. The theory would also acknowledge that local environmental laws have their critiques, limitations, and problems. There may be a mismatch between the vast geographical scope of an environmental problem and the constrained boundaries of the local jurisdiction, for example. Some claim that the local political process is more susceptible to political pressure than state or federal politics,⁴⁷ or that it lacks in accountability.⁴⁸ We refer also to these issues below.

F. Extended Producer Responsibility—a Boundary Case on Local Level Environmental Policy

In order to fully adhere to the calls⁴⁹ for empirically rigorous “public choice and law” research that is “particularized to specific institutional arrangements and actors,” this Article follows a case study approach that focuses on a specific environmental policy approach: extended producer responsibility (“EPR”). Traditionally, manufacturers bear the environmental responsibility for the impacts of producing the goods, consumers for the usage-related consequences, and local governments bear the responsibility for the waste that results when products are discarded.⁵⁰ With

⁴⁷ See, e.g., Linda M. Malone, *When Federal Initiatives Fail*, in *NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW* 123, 135 (John R. Nolon ed., 2003).

⁴⁸ See, e.g., James M. McElfish Jr., *Learning from the Past and Looking Toward the Future*, in *NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW* 399, 406–07 (John R. Nolon ed., 2003).

⁴⁹ See, e.g., DANIEL A. FARBER AND ANNE JOSEPH O'CONNELL, *RESEARCH HANDBOOK ON PUBLIC CHOICE AND LAW* 6–9 (2010).

⁵⁰ *Extended Producer Responsibility: A Prescription for Clean Production, Pollution*

the advent of EPR, this division of roles is changing in many jurisdictions and for many types of products. As of 2014, more than 380 EPR programs have been established globally—over 120 of them in the U.S. alone.⁵¹ The covered product categories include electrical and electronic equipment, packaging, batteries, automobiles, tires, paint, and pharmaceuticals.⁵²

The rationale behind EPR is quite straightforward: by assigning producers the financial and/or physical responsibility for the management of end-of-life products, the producers are assumed to internalize waste management considerations into their product strategies.⁵³ Rational producers would search for means to minimize their end-of-life management costs and thus increase the recyclability of their products. This policy strategy takes its most conspicuous form when it expands the responsibility of the producers to “take back” their products that are discarded.⁵⁴

Large metropolitan areas and cities are, as noted, the salient units of national economies for the production, consumption, and disposal of products.⁵⁵ Cities have also played an important role in the emergence of EPR, as the management of wastes such as discarded computers has increasingly drawn the attention of the public and policymakers.⁵⁶ The traditional

Prevention and Zero Waste, GRRN (July 2003), <http://www.grrn.org/page/epr-principles> [<http://perma.cc/89NZ-FYBG>].

⁵¹ *Id.*

⁵² ORG. FOR ECON. COOPERATION & DEV., *THE STATE OF PLAY ON EXTENDED PRODUCER RESPONSIBILITY (EPR): OPPORTUNITIES AND CHALLENGES* (2014), available at <http://www.oecd.org/environment/waste/Global%20Forum%20Tokyo%20Issues%20Paper%2030-5-2014.pdf> [<http://perma.cc/2FSQ-8KTR>].

⁵³ Thomas Lindqvist & Karl Lidgren, *Modeller för förlängt producentansvar [Models for Extended Producer Responsibility]*, in *FRÅN VAGGAN TILL GRAVEN—SEX STUDIER AV VARORS MILJÖPÅVERKAN [FROM CRADLE TO GRAVE—SIX STUDIES ON THE ENVIRONMENTAL IMPACT OF PRODUCTS]* 7 (Ministry of the Env't ed., 1990), on file with author; Harri Kalimo et al., *Greening the Economy through Design Incentives—Allocating Extended Producer Responsibility*, 21 EUR. ENERGY & ENVTL. L. REV. 274 (2012).

⁵⁴ In the European Union, the end-of-life management of computers, consumer electronics and, in fact, almost anything with a power cord, is today the responsibility of producers under Directive 2002/96/EC of the European Parliament and of the Council on Waste Electrical and Electronic Equipment (“WEEE Directive”). See OJ L [2002] 37/24. In British Columbia, a range of household hazardous wastes including spent pharmaceuticals, left-over paint, and lube oil, are managed by consortia of producers from relevant industries. Ronald J. Driedger, *From Cradle to Grave: Extended Producer Responsibility for Household Hazardous Wastes in British Columbia*, 5 J. OF INDUS. ECOLOGY 89 (2001); Duncan Bury, *Canadian Extended Producer Responsibility Programs: The Shift from Program Roll Out to Program Performance*, 17 J. OF INDUS. ECOLOGY 167 (2013).

⁵⁵ Pierre Desrochers, *Cities and Industrial Symbiosis: Some Historical Perspectives and Policy Implications*, 5 J. OF INDUS. ECOLOGY 29, 29 (2001).

⁵⁶ See *E-Waste Recycling FAQs*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc>

means of dealing with non-point sources and solid waste—local land-use regulations and waste management plans—are not well adapted to addressing the environmental impacts of more exotic waste streams such as waste electronics.⁵⁷ Managing such wastes can also be very expensive, and hence strains local budgets. There are requirements for special handling, so the local governments have looked to new policy strategies both to lower the cost of managing these wastes (e.g., design for recycling) and to shift the costs to other entities (e.g., industry take-back).⁵⁸ Thus, cities, through organizations such as the U.S. Conference of Mayors,⁵⁹ have been strong proponents of federal EPR requirements. The role of cities in EPR is not limited to support of national policies, however. New York City enacted a local law establishing extended producer responsibility for waste electronics.⁶⁰ King County, Washington and Alameda County, California have established EPR programs for unused pharmaceuticals.⁶¹

Yet extended producer responsibility as a *local* level policy instrument has so far received only limited attention.⁶² It is not clear whether

[.org/newyork/campaign-recycling-waste.asp](http://newyork/campaign-recycling-waste.asp) [<http://perma.cc/C5W9-HD7A>] (last visited Nov. 12, 2015).

⁵⁷ See Jennifer Bradley, *Federalism and Environmental Protection*, in REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM" 9, 11 (Douglas T. Kendall ed., 2004); Daniel C. Esty, *Preface: The Next Generation of Environmental Law*, in NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW xv, xv (John R. Nolon ed., 2003).

⁵⁸ See generally Véronique Monier et al., DEVELOPMENT OF GUIDANCE ON EXTENDED PRODUCER RESPONSIBILITY (EPR) (2014) [hereinafter GUIDANCE ON EPR] available at http://ec.europa.eu/environment/waste/pdf/target_review/Guidance%20on%20EPR%20-%20Final%20Report.pdf [<http://perma.cc/974E-M9BJ>].

⁵⁹ Supporting Extended Producer Responsibility for Products, Res. 61, 78th Annual U.S. Conference of Mayors (May 28, 2010), http://www.usmayors.org/resolutions/78th_Conference/resolutionsfull.pdf [<http://perma.cc/9CJ5-5R4E>].

⁶⁰ New York, N.Y. Res. 1300-2008 (Mar. 26, 2008), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448112&GUID=9AF9CF41-2A3F-4CEB-AF98-48E89AD7CA73&Options=&Search=> [<http://perma.cc/58EX-KALF>] (to amend the administrative code of the city of New York, in relation to the collection for recycling, reuse, and safe handling of electronic equipment in the city of New York). The law was repealed after a state law mandating EPR for waste electronics was enacted.

⁶¹ King Co., Wash., Proposed Rule BOH 13-03.1 (June 5, 2013), <http://www.kingcounty.gov/healthservices/health/BOH/resolutions/~media/health/publichealth/documents/boh/BOHResolution1303.ashx> [<http://perma.cc/N26V-RVYF>]; ALAMEDA CO., CAL., ORDINANCE CODE ch. 6.53 (2015), https://www.acgov.org/aceh/safedisposal/documents/SDD_Ordinance.pdf [<http://perma.cc/W2JB-HNUA>].

⁶² It is important to distinguish the role of local governments as policymakers establishing EPR much as state and national governments do from local governments as participants in EPR systems providing collection and related services. See, e.g., GUIDANCE ON EPR, *supra* note 58. It is the former and not the latter role that is the subject of this Article.

EPR is well suited for local level policy-making, and if so, under what circumstances. It is clear, however, that it is a policy that is part of long-term economic development. The shifting of the financial responsibility from tax payers to the producer, as well as the manner in which the producer may or may not be able to channel the ensuing costs to various other stakeholders such as the consumers, distributors, and waste handlers, may also entail reallocation of costs in ways that will be explained in more detail below. Although the implementation of EPR necessitates a legal command-and-control framework, EPR has at its core a market-based mechanism for creating incentives for proper environmental behavior: responsibilities for end-of-life management are shifted to producers in order to make it financially desirable for them to produce products with environmentally improved performance.⁶³ It thus seems conducive to both economic and environmental policies.

Further, EPR is an environmental *product* policy because it deals with the end-of-life treatment of goods through a life cycle-based approach. In today's interconnected global society, products are developed, manufactured, assembled, distributed, sold, (re-)used, recycled, and discarded across multiple jurisdictions. The involved product and waste streams are therefore intrinsically linked to interstate trade. Local EPR as a policy that is at the same time facially interjurisdictional makes for a very interesting boundary case for this Article's analysis of the relationship between constitutional trade law and public choice theory at the local level because it so clearly entails extrajurisdictional impacts. Overall, the diverse and case-specific nature of the public choice explanations⁶⁴ calls nonetheless for care in trying to expand the EPR-specific findings towards general *ex ante* predictions about the limits of local level environmental law and policy.

I. FORMAL AND INFORMAL LIMITS TO LOCAL AUTONOMY

A. *Formal Limits to Local Autonomy in the Constitutional System of the United States*

The constitutional system in the United States carefully protects the powers and independent democratic processes of the fifty states through the reserved powers doctrine of the Tenth Amendment.⁶⁵ *Local* level governments, however, are not at all mentioned in the federal Constitution.

⁶³ Whether this has in fact occurred is a separate question. *See, e.g.*, Kalimo et al., *supra* note 53. The issue at hand is the use of this strategy by local governments.

⁶⁴ *See* Revesz, *supra* note 11.

⁶⁵ U.S. CONST. amend. X.

Local autonomy, “Home Rule,” grows out the state constitutions, and is also directly constrained by them.⁶⁶ The U.S. Supreme Court has ruled that local governments only exist by virtue of the state constitutions: the municipal subdivisions “are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [the state’s] absolute discretion.”⁶⁷ If the language of state constitutions delegating powers to the local level authorities is not express and unambiguous, any doubts tend to be resolved *against* local authority.⁶⁸ Many state constitutions do contain general home rule provisions, and numerous states have enacted statutes that delegate important authority to local authorities on specific issues.⁶⁹ Local authorities are therefore usually permitted to raise funds within their jurisdictions and to also spend such funds locally.

On the other hand, a local law receives in many respects the same treatment under the federal constitution as do state laws.⁷⁰ Local laws are pre-empted by state (or federal) laws along the principles established by the Supremacy Clause of the U.S. Constitution: the state statute may *expressly* pre-empt local laws, the state statute may exhaustively *occupy a field* of law, or the local laws may be preempted because of an irreconcilable *conflict* with the superior state law.⁷¹ Perhaps the most important constitutional limitation to local powers beyond the Supremacy Clause, in particular from the perspective of the economy, is that local measures

⁶⁶ David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 261–62 (2005).

⁶⁷ Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991); Richard Briffault, *What about the “Ism”?* Normative and Formal Concerns in Contemporary Federalism, 47 VAND. L. REV. 1303 (1994).

⁶⁸ John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, in NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW 3, 11 (John R. Nolon ed., 2003); see, e.g., N.Y. CONST. art. XI; N.Y. MUNICIPAL HOME RULE LAW § 36-a.2.10 (McKinney 2011) (granting the local authorities the power to enact laws relating to the protection of their physical and visual environments). Even states with strict delegation of powers to their localities, such as Georgia and North Carolina, may have specific provisions to permit the adoption of local environmental laws. Nolon, *supra* 64, at 18.

⁶⁹ Barron & Frug, *supra* note 66, at 263.

⁷⁰ HARRI KALIMO, E-CYCLING-LINKING TRADE AND ENVIRONMENTAL LAW IN THE EU AND THE U.S. 360–61 (2006).

⁷¹ U.S. CONST. art. VI; see, e.g., Philip Weinberg, *Overcoming the Preemption Problem*, in NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW 147, 148, 152–60 (John R. Nolon ed., 2003); Harri Kalimo, *Reflections on the Scope and Pre-emptive Effects of Community Legislation—a Case Study on the RoHS Directive*, in THE YEARBOOK OF EUROPEAN ENVIRONMENTAL LAW 157 (Thijs F. M. Eddy & Han Somsen eds., Vol. 5, 2005); see also TRIBE, *supra* note 41, at 1175–76.

cannot hinder interstate *trade* by discrimination or otherwise creating obstructions to trade.⁷² The constitutional rules to solve this kind of interstate trade disputes are in the United States enshrined in the Dormant Commerce Clause doctrine. The Dormant Commerce Clause doctrine applies also to *local* measures that impede interstate trade, just as it applies to state measures.⁷³ The task of controlling purely *intrastate* trade between localities falls, however, on the state constitution and authorities alone.⁷⁴ The Supreme Court noted in the interstate commerce case *Fort Gratiot*: “[a] State (or one of its political subdivisions) may not avoid the structures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.”⁷⁵ There thus are formal federal constitutional limits to the powers of local authorities to conduct policy.

In the legal practice, the precise scope of the powers granted to state and local authorities vis-à-vis the central government has over time varied considerably depending on the United States Supreme Court’s approach on federalism⁷⁶ at a given time.⁷⁷ The court’s case law does not appear to present any consistent, generally applicable principles from which to determine the vertical division of powers. Rather, the distribution between the central and subordinate levels has, in practice, tended to vary depending on the type of issue at stake. Important to this Article, it is often claimed (and critiqued) that especially in *interstate trade* cases, the Supreme Court has taken a particularly centralist position.⁷⁸ Lower level authorities’ policy

⁷² For a discussion on the distinctions between different types of interstate trade questions, see *infra* Part II.

⁷³ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 430 (4th ed. 2011).

⁷⁴ See, *cf. id.*, at 430.

⁷⁵ *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992).

⁷⁶ Federalism in this Article refers to the constitutional division of sovereignty in general, not to the notion of a *more centralized* government.

⁷⁷ In the research of Kendall and others, the states seemed to be in a rather broad consensus over the issues on which the Supreme Court’s jurisprudence had been too strict, on which it had been too loose, and on which it had been quite opportune. Douglas T. Kendall, *The Voice of the States: An Overview*, in REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 61 (Douglas T. Kendall ed., 2004).

⁷⁸ Indeed, Kendall claims that over the past three decades, out of the sixty-one Dormant Commerce Clause cases, fifty-six have been filed by a private party rather than a discriminated state. Thirteen out of these sixty-one cases have been filed and/or supported by states and/or localities. Moreover, during the past fifteen years, even the states being discriminated against have taken a stand in support of the defendant, i.e., in favor of the state that is discriminating against them. Not a single state has supported the striking down of a state law on Dormant Commerce Clause grounds during these fifteen years. Douglas T. Kendall, *Limiting State Experimentation Under the “Dormant” Commerce Clause*, in

options are severely limited for the fear of interfering with the proper functioning of the United States national market. However, according to many observers, the Court has since the 1990s been on a “federalist revival,”⁷⁹ which to these observers means a devolution of powers from the central towards the subordinate levels of government.⁸⁰ This would mean less strict formal limits on the local authorities’ ability to make policy.

Considering how formal constitutional law links to the city authorities’ ability to construe urban policy, it appears next (in Part I.B) useful to further analyze Peterson’s theory on the *informal* limits of city policies, and to assess how the heuristics resonate with those of interstate trade law, including prominent interpretations of such law by constitutional law scholars such as Laurence Tribe and Donald Regan (Part III).

B. Informal Limits to Local Autonomy—Economic Development and Redistribution

Whereas constitutional law sets *formal* limits on local powers in the ways described above, Peterson’s *City Limits*⁸¹ is precisely a description of the significant *informal* forces that also exert pressure on the local authorities. Urban public policy is explained by intermunicipal competition between cities,⁸² each with their own independent powers and objectives.⁸³

Peterson elaborates his claim about the limits of local policy by dividing local urban policies into three general categories: those that *promote* economic objectives (“developmental”), and those that have either a *negative* (“redistributive”), or *neutral* (“allocational”) impact on the economy.⁸⁴ It is worth noting that Peterson indeed equates *redistribution*—the redirecting of wealth to less well-off segments of the society for reasons of equity—with a *negative* effect on the local economy.⁸⁵ Police and fire protection are classic examples of allocational policies; public goods and services are delivered in ways that are developmentally and distributionally neutral. Peterson later merged allocational policies to redistributive policies,⁸⁶ and the same approach is followed here.

REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 79 (Douglas T. Kendall ed., 2004); Kendall, *supra* note 77, at 61–64.

⁷⁹ Bradley, *supra* note 57, at 9.

⁸⁰ *Id.*

⁸¹ See generally PETERSON, *supra* note 16.

⁸² *Id.* at 4. For other reasons, see *infra* Section 1.1.

⁸³ Barron & Frug, *supra* note 66, at 265.

⁸⁴ Paul E. Peterson, *Devolution’s Price*, 14 YALE L. & POL’Y REV. 111, 112–13 (Mar. 1996).

⁸⁵ See PETERSON, *supra* note 16.

⁸⁶ PAUL E. PETERSON, THE PRICE OF FEDERALISM 66–71 (1995); see also Peterson, *Devolution’s Price*, *supra* note 84, at 112–13.

The (regulatory) competition between the local authorities leaves them in Peterson's view no other choice but to pursue the supreme interest of *economic development* (productivity) within their own jurisdictions.⁸⁷ The localities' behavior may therefore not only, and sometimes not at all, be constrained by the fact that the local authorities were approaching the limits of their formal constitutional powers. The behavior is limited much earlier by the need to attract private investment, labor force, citizens, and corporations within the state-designed structure in place.⁸⁸ Because of these limits, Barron and Frug have concluded that instead of *local autonomy*, local authorities possess what could be called *limited powers*.⁸⁹ The formal boundaries of law enforce the notion by serving as the ultimate border, which cannot be transgressed even where the policy objectives called for it. Barron and Frug suggest that in order to preserve what remains of their limited powers, the localities have engaged in "defensive localism" against centralizing forces.⁹⁰

Peterson's categories deserve a closer analysis, however, and environmental policies can be used as an example to explore them further. The protection of the environment is primarily a non-economic objective with repercussions from local to the global level. The short-term impacts of many environmental measures on the economy, industry in particular, may often be neutral or negative. Stricter air pollution standards on production facilities or vehicles, extended responsibilities for producers to take back their own products at the time of discard, or requirements to conduct detailed environmental impact assessments prior to projects all entail costs of various sorts, which will in the short term generally negatively influence economic development.⁹¹

Yet environmental policy is often claimed to have positive impacts on economic development, if the longer-term effects are emphasized

⁸⁷ PETERSON, *THE PRICE OF FEDERALISM*, *supra* note 86, at 66–71; *see also* Peterson, *Devolution's Price*, *supra* note 84, at 112–13.

⁸⁸ Barron & Frug, *supra* note 66, at 266; PETERSON, *supra* note 16, at 22–38. We leave aside here the question of whether the local authorities may or should be divided further into "cities" and "suburbs". According to Barron and Frug, the distinction no longer is as sharp as it used to be, and in particular not relevant for our focus on the city level. Barron & Frug, *supra* note 66, at 268.

⁸⁹ *See* Barron & Frug, *supra* note 66.

⁹⁰ *Id.*

⁹¹ Peterson lists collection of waste and refuse as an allocational activity. As noted, he later merged allocational policies into the redistributive ones and EPR has more implications in this discussion with respect to assignment of financial burdens than with respect to service provision. PETERSON, *supra* note 16, at 4.

instead.⁹² The well-known work of Porter and van der Linde argued for a link between environmentally progressive companies and their competitiveness already in the mid-1990s.⁹³ The lively debate that has continued around this topic shows well how it may be difficult to make clear distinctions⁹⁴: what seems a drag on the economy today may or may not turn out to promote economic development at a later point in time. The internalization of the environmental costs (“externalities”) through the application of the polluter pays principle and often reallocates the environmental costs from the anonymous general public to targeted parties in the value chain with, one hopes, the result that the polluting party’s behavior changes to the benefit of many interests.

The dynamic nature of the societal policies themselves also needs to be taken into account in assessing Peterson’s categorization: at different times and in different places, environmental policy may be either developmental or not. Moreover, in a more detailed analysis, a single policy such as a local extended producer responsibility scheme would seem capable of both enhancing economic development and the reverse, depending on the policy elements *within* it. Take-back and recovery obligations on specific end-of-life products may boost the local recycling industry and reduce local taxes because of the reduction in the cost of municipally delivered waste services and thus may be attractive to businesses and residents. At the same time, the responsibilities on local retailers to take back and separate different kinds of products for further treatment by municipalities could be a burden to the local economy. Much will in practice depend on the details of each individual measure.⁹⁵

The above example shows why redistributive societal policies tend to be left to the national authorities.⁹⁶ The local authorities are likely to be reluctant to impose taxes directly on locally situated corporations’ profits.⁹⁷ A higher tax could risk driving the companies in question into

⁹² See, e.g., *id.* at 65.

⁹³ Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, 73 HARV. BUS. REV. 5, 120 (1995).

⁹⁴ See, e.g., STEFAN AMBEC ET AL., THE PORTER HYPOTHESIS AT 20: CAN ENVIRONMENTAL REGULATION ENHANCE INNOVATION AND COMPETITIVENESS? (2011); Daniel C. Esty & Michael E. Porter, *Industrial Ecology and Competitiveness: Strategic Implications for the Firm*, 2 J. OF INDUS. ECOLOGY 35 (1998).

⁹⁵ See Harri Kalimo et al., *What Roles for Which Stakeholders under Extended Producer Responsibility?*, 24 REV. EUR. COMP. & INT. ENV. L. 40, 51 (2015).

⁹⁶ PETERSON, *supra* note 16, at 68–69.

⁹⁷ *Id.* at 75.

lower-tax jurisdictions. This would work against the objective of economic development, so that under a regulatory competition approach, the local authorities would be unlikely to enact such higher tax regimes. The logic of the events would also squarely explain the level-playing-field argument that speaks for the constitutional model of harmonization. In upward harmonization, the tax levels are made uniform on a higher level across the federation.

C. *Informal Limits to Extended Producer Responsibility*

But even this view of the categories appears too simplistic. With modern product-related environmental measures, such as extended producer responsibility law, the situation may be quite complex. These kinds of rules may be unfriendly to some businesses, yet the local authorities actually are happy to engage in them. The difference stems from the geographic distribution of the economic and environmental impacts. Because product-based environmental measures are typically applied in the jurisdiction where the products are sold, many of the parties selling there cannot escape the measures by simply shifting their physical location to a different jurisdiction.⁹⁸ An importer is caught in the same manner as is a local producer. In fact, the situation is reversed: whereas the beneficiaries (e.g., the citizens) of the cleaner environment and of a lower municipal tax burden *are* located within the regulating jurisdiction, the companies burdened by product-related environmental measures may well be located mostly, or in the global economy even exclusively, elsewhere.

There may also be differences between the various economic operators. It could be in the local authorities' economic development interests under an extended producer responsibility approach to *limit* charges on retailers—who are likely to be local economic operators—with the cost of managing returned waste products. Instead, the local ordinance could also allocate that part of the responsibility to the manufacturers of the products, located outside the local economy. If instead manufacturers were local companies, public choice theory would suggest a different outcome: take-back measures would target more the retailers than the manufacturers, because the former could not leave the jurisdiction without losing their markets, while the latter could. The local authorities may hence attempt

⁹⁸ Internet sales have recently emerged as a challenge to the use of EPR, potentially altering some of the dynamics described here. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 52, at 16.

to externalize selected parts of the economic costs of waste management to promote local economic development or at least to avoid the costs to local taxpayers of achieving environmental goals. Product-related environmental measures, such as extended producer responsibility, may therefore export the burdens of regulation to other localities in markets where producers are not local companies. These policies would be extraterritorial in their (negative) economic effects.

How and where exactly in the central and subordinate levels of government to conduct economic development and related policies boils in practice down to an assessment of the values and objectives of federalism. Peterson's application of public choice theory to the motives and limitations of the local operators can from this perspective be seen as an important part of the picture on federalism.⁹⁹ If Justice Brandeis saw in 1932 the states as the laboratories of democracy,¹⁰⁰ another Justice, Stephen Breyer, has noted more recently that federalism aims at granting the citizens a degree of control and a sense of community in today's interrelated and complex world.¹⁰¹ Federalism can increase the citizens' satisfaction in politics. This is in fact the essential "neutral value" of federalism according to Kendall.¹⁰² Briffault¹⁰³ notes that *local* government offers particularly good opportunities for democratic participation. The smaller the community, the tighter is the sense of community. This enhances participatory decision-making—and vice versa. Local authorities may manage issues that are beyond the resources and awareness of the state and federal authorities.¹⁰⁴

Yet, coming back to Peterson, to what extent does such a sense of control or satisfaction reflect the realities of local decision-making? Indeed, Peterson stresses that exactly because of the strict limits imposed upon it, local politics is *not* like state politics, nor is it like national politics.¹⁰⁵ The notion of control is weaker, as one is pushed by external forces to focus

⁹⁹ See PETERSON, *supra* note 16.

¹⁰⁰ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

¹⁰¹ *College Savings Bank v. Florida Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 703 (1999) (Breyer, J., dissenting).

¹⁰² Kendall, *supra* note 46, at 21.

¹⁰³ Briffault, *supra* note 67, at 1313; see also JOHN R. NOLAN, *NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW* (John R. Nolon ed., 2003); Gerald E. Frug, *The City as an Economic Concept*, 93 HARV. L. REV. 1059 (1980).

¹⁰⁴ John R. Nolon, *Introduction: Discovering and Evaluating Local Environmental Law*, in *NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW* xxi, xxix (John R. Nolon ed., 2003).

¹⁰⁵ PETERSON, *supra* note 16, at 4.

on *economic development policies*. Maybe the need to work within these limits is a reason why local responses have been claimed to be flexible and context specific.¹⁰⁶ Environmental activists, industrial point source dischargers, and taxpayers may, for example, at the local level form unexpected coalitions with municipalities going after the *non*-point source polluters, quite consistently with economic development objectives. Such choices influence the overall regulatory system, however, and thus need to fall within the boundaries of what is acceptable in terms of their effects on interstate trade.¹⁰⁷

II. INTERSTATE TRADE LAW—THE DORMANT COMMERCE CLAUSE

A. *Dormant Commerce Clause and the “Law of Prohibition”*

The local authorities’ ability to legislate is also limited in a formal way. The Dormant Commerce Clause in the U.S. Constitution sets legal limits on cities’ ability to make policy. The case law on the Dormant Commerce Clause is nevertheless muddled, even sharply contested,¹⁰⁸ and scholars have interpreted it in different ways. Here, the Dormant Commerce Clause jurisprudence is described from the viewpoint of general trade law, dividing it into “law of prohibition” and “law of justification.”¹⁰⁹ This approach highlights effectively the reconciliation between economic and non-economic values, which in turn resonates interestingly with the split into economic development policies and redistributive policies in Peterson’s theory. In simplified terms, the clause can be seen as stipulating that local requirements must not hinder the access of imported products to the local market. The Supreme Court had heralded already 80 years ago:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce

¹⁰⁶ Nolon, *supra* note 68, at 36.

¹⁰⁷ Malone, *supra* note 47, at 135.

¹⁰⁸ *See, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207 (1994) (Scalia, J. & Thomas, J., concurring); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part, dissenting in part); *United Haulers Ass’n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J. concurring in part), at 349 (Thomas, J. concurring).

¹⁰⁹ *See KALIMO, supra* note 70, at 39–125.

by the certainty that he will have *free access to every market* in the Nation.¹¹⁰

The Dormant Commerce Clause can be understood¹¹¹ as dividing local measures into three types: facially (i.e., *de jure*) discriminatory measures (*Philadelphia v. New Jersey*),¹¹² *de facto* discriminatory measures (*Dean Milk*;¹¹³ *Washington Apple*),¹¹⁴ or evenhanded measures with only incidental effects on trade (*Pike v. Bruce Church*).¹¹⁵ Seen in this way, the Dormant Commerce Clause follows general trade law theory,¹¹⁶ which roughly speaking merges the first two, discrimination-based, groups of the Dormant Commerce Clause doctrine so as to constitute the following combination of tests: whether the rules *discriminate* or, if they do not, whether they nonetheless create *obstacles* to trade.¹¹⁷

Under the “discrimination approach”, the judicial trigger for prohibiting local measures is that they discriminate between local and non-local products in interstate trade.¹¹⁸ Like products or processes are, on the basis of their origin, not treated in interstate trade in an equal manner, or *unlike* products are treated the same way. Any form of discrimination from blatant, formal discrimination to subtle forms of “unintentional” material discrimination may be included under the heading.¹¹⁹

¹¹⁰ The notions of non-discriminatory market access may be traced back to 19th century cases. *See Oregon Waste Sys., Inc. v. Dept. of Env'tl. Quality*, 511 U.S. 93, 107 (1994) (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)).

¹¹¹ There are different ways to interpret and consequently to categorize the Supreme Court's Dormant Commerce Clause case law. For a detailed analysis, *see KALIMO, supra* note 70, at 49–129, 641–58.

¹¹² *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

¹¹³ *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

¹¹⁴ *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333 (1977).

¹¹⁵ *Pike v. Bruce Church*, 397 U.S. 137 (1970).

¹¹⁶ There are two principal strands to trade law: the prohibition-justification approach described here, as well as the so called aims-and-means tests. The analysis here is based on the former approach.

¹¹⁷ *See KALIMO, supra* note 70, at 39–125.

¹¹⁸ *Id.*

¹¹⁹ Different (discrimination) tests have emerged as a consequence of a lively doctrinal debate over the approach in applying the Dormant Commerce Clause. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978) (outlining different tests). Often, the prohibited discriminatory measures have been defined widely: “[T]he evil of protectionism can reside in legislative means as well as legislative ends.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). Indeed, local economic interests may not be protected by measures that hinder the market access of out-of-state producers. In the much quoted

Under the “obstacle approach” the interstate trade regime goes beyond the abolition of mere *discrimination*.¹²⁰ It prohibits also evenhanded measures that simply make the importation of goods more costly or difficult—even if the same measure equally obligated local producers already on the market.¹²¹ From the perspective of a local government setting up, for example, an environmental program, the formal constitutional limits on its policy choices therefore are tighter under an obstacle approach to trade law than under a discrimination approach: if the application of the program renders the sales of an imported product more onerous or costly, the scheme *could* be determined unconstitutional also in the absence of discriminatory elements. Under an obstacle approach, more latitude is thus given to protecting the marketplace when assessed against the policies of the public authorities.

B. Dormant Commerce Clause and the “Law of Justification”

The general theory of trade law described above has, however, a second step: after the initial phase of *prima facie prohibiting* trade hindering measures follows a phase of *justification*.¹²² To the extent that a state requirement is deemed prohibitive, as discriminating or creating an obstacle to trade, it may still be *justified*—like granting an exemption. The rationale for such justifications is that societies should be able to promote social values of such importance that they may indeed need to *override* the economic interest of a smoothly functioning marketplace, which is the trigger for the prohibition.¹²³ Local measures that fall in the first Dormant Commerce Clause group of facially discriminatory measures have extremely slim chances of being justifiable.¹²⁴ Local measures in the Dormant Commerce Clause’s second group—those that are evenhanded in text but discriminatory in practice—may in some cases be considered justifiable.¹²⁵ For the third group, i.e., of evenhanded measures, the

words of Justice Cardozo, “The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.” *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523–24 (1935).

¹²⁰ See KALIMO, *supra* note 70, at 43, 52.

¹²¹ *Id.* at 52.

¹²² *Id.* at 88.

¹²³ *Id.*

¹²⁴ 15A AM. JUR. 2D *Commerce* § 103 (2015).

¹²⁵ *Id.*

presumption is reversed; they are justifiable unless a lenient test deems them prohibited.¹²⁶

III. CITY LIMITS MEET THE DORMANT COMMERCE CLAUSE

A. *Law of Prohibition*

The specific question then arises, whether the seemingly libertarian Dormant Commerce Clause tests on prohibited and justifiable measures also affect the *kind* of policy that the local authorities may engage in and how such impacts may compare with the theory of Peterson. Peterson's central category of "economic development" measures is often obviously closely associated with interjurisdictional *trade*.¹²⁷ But is economic development within the local jurisdiction best promoted by a liberal or a protectionist approach to interjurisdictional trade? Without the possibility to here dwell on all the economic discourse on the benefits and disadvantages of free trade versus protectionism, it may be noted that legitimate cases for protectionism (e.g., infant industry argument) are few and far between. On occasion the proponents of protectionism may have captured the political system so as to unfairly promote their economic interests. However, if both Peterson's claim on local, longer term economic development objectives and the economic theory of free trade hold, local measures would indeed seem to have an inbuilt mechanism not to run afoul of open trade. They appear to work toward removing protectionism and interest capture.

Legally speaking, there is little ambiguity in city policies which would promote local economic development through *discriminatory* measures run counter to the classic prohibitions of trade law. Trade law doctrine will prohibit local policies to the extent that they would *discriminate* against out-of-state interests.¹²⁸ In other words, these are the earlier mentioned constitutional limits to the policies that a locality may employ. It may not structurally favor local parties at the cost of importers.¹²⁹

A more difficult and delicate question is facially neutral, but *de facto*, discriminatory measures, as well as measures that are discriminatory neither in law or in fact, but simply hinder trade in some entirely

¹²⁶ See KALIMO, *supra* note 70, at 49–88, 641–58.

¹²⁷ See PETERSON, *supra* note 16.

¹²⁸ See *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994).

¹²⁹ See, e.g., *id.* (explaining the revenue from a nondiscriminatory Massachusetts tax regime on all milk sold by milk dealers in the state was redirected as a subsidy, which was only available to *local* milk producers affected by the tax).

incidental fashion (obstacle approach). The Supreme Court's Dormant Commerce Clause case law has set limits on local economic development measures where, for example, the "necessary tendency of the statute is to impose an *artificial rigidity* on the economic pattern of the . . . industry."¹³⁰

On the surface, it would appear that by giving precedence to an unobstructed market place over, say, environmental policy, the obstacle approach will automatically give preference to economic development as suggested by Peterson.¹³¹ A local authority may not compete as effectively for citizens and other resources with social policy arguments or other offerings that do not promote economic development because these regulations may be constitutionally invalid. The informal forces constraining the local authorities to economic development objectives would under this construction be *prima facie* supported by the formal limits of the constitution on the enactment of socially motivated regulation. It is another matter that such *prima facie* prohibited measures can subsequently be determined constitutionally justifiable.

B. Law of Justification

Indeed, if a measure is determined prohibited in the first, prohibition phase, there still follows the analysis on whether it may nonetheless be approved in the next, *justification* phase of the trade law test. Thus, should a measure to promote local *economic development* (à la Peterson) be considered *prima facie* prohibited by trade law, or could it nonetheless qualify as, or contribute to, a legitimate objective so as to be determined *justifiable*?

Economic grounds have had poor chances of being considered acceptable justifications for trade restricting measures.¹³² How could they, if the notion of unfettered competition underlies the entire trade law logic? The Court has clearly stated that a state is without power to prevent articles from being shipped and sold in interstate commerce on the grounds that they are required to satisfy, for example, local demands for employment.¹³³ The fact that the mere economic development concern of creating employment opportunities does not usually survive as a legitimate concern in Dormant Commerce Clause scrutiny is worth underlining, because jobs are usually the key economic development concern of any

¹³⁰ *Toomer v. Witsell*, 334 U.S. 385, 403–04 (1948).

¹³¹ See PETERSON, *supra* note 16.

¹³² See generally ORG. FOR ECON. COOPERATION & DEV., *supra* note 52.

¹³³ *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

elected local official. Using extended producer responsibility again as an example, the prospective jobs, created in the labor-intensive manual waste dismantling and recycling processes, would not stand as a defensible reason for justifying the establishment of extended producer responsibility under a Dormant Commerce Clause challenge.¹³⁴ In order to survive the constitutional scrutiny, it thus would need to be established that the local job creating measures in fact stand on other, sound justification grounds. In an extended producer responsibility scheme, the objective of *protecting the environment* e.g., by reducing virgin material extraction, lowering the impact of production through the use of recycled materials, and avoiding incineration and landfilling, could qualify as such grounds.

From the perspective of linking the trade law analysis to Peterson's theory, one would then need to determine whether the emphasis on environmental, as opposed to economic development considerations, would influence the measure's qualification as an "economic development measure," and perhaps exclude it from development measures under Peterson's categorization? In other words there would seem to be an inherent conflict *at the justification* phase of the trade law test, but Peterson claims that cities are structurally pushed to implement measures that promote economic development.¹³⁵ However, if cities restrict interstate trade in any fashion, these kinds of local measures are unlikely to survive a Dormant Commerce Clause scrutiny. To put this more simply: the likeliest kind of local measures in Peterson's theory (i.e., the economically grounded ones) are amongst the least likely to survive a trade law *justification* test.

There are two important qualifications to this construction. First, as implied above, from a longer-term free market perspective, economic development policies may be structurally unlikely to be discriminatory or trade-restrictive to begin with. They would be unlikely to fall under the first, prohibition phase of the scrutiny. Economic development, from this perspective, is and indeed should be pursued through a nonprotectionist agenda, including when the measures are (partly) environmental. This would save them from the constitutionality scrutiny from the outset. And if trade law tests help in distinguishing the protectionist local (environmental) measures that promote economic development from the nonprotectionist (environmental) economic development measures, constitutional law will indeed promote the long-term economic development of the locality.

¹³⁴ In a similar fashion, the *Carbone* court focused on the fact that the principal aim of the flow ordinance was to ensure the profitability and thus the continuity of the waste facility. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994).

¹³⁵ See PETERSON, *supra* note 16.

Another question worth posing is, assuming that the promotion of economic development is indeed the deterministic general reasoning behind local policy-making, whether such an objective would necessarily translate into uniform, predetermined policy measures when implemented in different localities. Peterson appears to claim that despite the many conflicting political views, the “structurally supreme objective” of economic development leaves the local authorities little choice.¹³⁶ If extended producer responsibility proves to be the superior way of dealing with a particular waste management issue from the perspective of the economic development of the locality—perhaps because it externalizes a waste cost to producers located beyond the municipality’s borders—all local authorities are under external pressure to follow the strategy.

Trade law may in this respect work in parallel with Peterson’s thinking. In the justification phase of a constitutional challenge, it namely needs to be established whether there exists any other measures that are equally effective in reaching the social objective, but that are less restrictive in terms of interstate trade.¹³⁷ This “least restrictive measures” analysis will promote the choice of the measure that, presuming the long term economic advantageousness of open trade, will lead to the most positive economic development. In other words, the justification test serves as the second frontier in distilling economic parochialism from the policies without making a judgment on the societal objectives of the policy itself. A particularity of the Dormant Commerce Clause is that the leniency of these justification tests seems to vary depending on whether the measure is considered facially discriminatory, *de facto* discriminatory, or evenhanded.¹³⁸

Extended producer responsibility policy as an economic development policy is, viewed in terms of Peterson’s theory, not informally limited, nor is it formally limited by trade law as long as it does not restrict trade more than other, environmentally equally effective alternative measures necessarily would do.¹³⁹ It is important to note that the least restrictive measures test should presume that the alternative measures reach at least the same level of environmental protection. For example, a proven ability of an EPR system to create an incentive on the producers to improve the environmental design of the products¹⁴⁰ could constitute an environmental protection standard that is difficult for alternative waste

¹³⁶ *Id.*

¹³⁷ *See, e.g.,* *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978).

¹³⁸ *See* KALIMO, *supra* note 70, at 62–66.

¹³⁹ *See* PETERSON, *supra* note 16.

¹⁴⁰ *See* Kalimo et al., *supra* note 53.

management measures to meet. EPR could also offer the only workable means of achieving a particular recycling (high) rate. The number of available alternatives could hence be limited.

C. *Political Representation*

There are further interesting links between Peterson's theory and trade law, which the example of EPR illustrates. In addition to the obstacle and discrimination approaches, as well as their combinations,¹⁴¹ to trade-restricting measures, there namely also exists a fourth prong of trade law: the "political representativeness" tests.¹⁴² In these tests, the focus is on the malfunctions in the political *process* that created the local regulation in question.¹⁴³ Protectionism is assumed to exist, if the group of interests against whom the measure works, was under-represented in the local regulatory process leading to the measure.¹⁴⁴ Tribe claims:

[B]ehind the [Supreme] Court's analysis stands an important doctrinal theme: the negative implications of the Commerce Clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the Clause is to ensure national solidarity, not necessarily economic efficiency.¹⁴⁵

The political representativeness approach depicts free interstate trade as a fundamental political right of those that are a part of the common

¹⁴¹ The combinations are sometimes called typological approaches. See, e.g., MIGUEL POIARES MADURO, *WE THE COURT—THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* 35–58 (1998); Joseph H. H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in *THE EVOLUTION OF EU LAW* 349, 358 (Paul Craig & Gráinne de Búrca eds., 1999).

¹⁴² See KALIMO, *supra* note 70, at 78–86.

¹⁴³ *Id.*

¹⁴⁴ This was the core of the intellectual theses of U.S. Supreme Court Justice Stone, laid by him and building upon case law in the 1940s. See *United States v. Carolene Products*, 304 U.S. 144 (1938); see also Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1160–61 (1985). The existence of the general theme has been accepted, yet by no means uncritically. See, e.g., TRIBE, *supra* note 41; Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (compare with his later, more critical analyses).

¹⁴⁵ TRIBE, *supra* note 41, at 1057 (emphasis in the original). Tribe, nevertheless, goes on to point out that the Court has, in several recent opinions, espoused the language of the "free market" as the underpinning of the Dormant Commerce Clause. *Id.* at 1058.

union.¹⁴⁶ The interests of out-of-state actors fall under constitutional protection within the union through the Dormant Commerce Clause.¹⁴⁷ All parties must have a representative way of participating in the discourse regarding the substance of the local measures that affect them.¹⁴⁸ All the relevant stakeholders should have a voice in the discussions: producer, retailer, and consumer viewpoints would be crucial to any consideration of extended producer responsibility laws.

So is Tribe's statement on the political nature of the American union and Dormant Commerce Clause more specifically contradictory to Peterson's economically grounded theory? If Peterson's claim—that inter-jurisdictional competition actually determines the content of the policy, regardless of who is deciding and under what political agenda—holds, would it mean that the political representativeness strain of trade law theory is misguided? It does not matter, that is, how representative the process is, because the local decisions are driven by economic development. At least Peterson seems to collate the political and economic strands of the reasoning, when he claims that the structural role of the local lawmakers is, *within certain limits*, to promote and protect the interests of their *own* constituents. In other words, economic parochialism cannot as such be characterized as a malfunction in a locality's political process¹⁴⁹—it may be a logically flowing implication of the economic development policies that the locality promotes.

D. *Local/Global Equivalence*

Peterson's theory seems to resonate in this respect well with Regan's approach to the Dormant Commerce Clause. Regan's economically based thesis is namely that in most cases, the local interests represented in a political process will protect the foreign interests equally well, even if they are not consciously considered.¹⁵⁰ Regan calls this *local/global*

¹⁴⁶ See generally KALIMO, *supra* note 70.

¹⁴⁷ See MADURO, *supra* note 141, at 168–75.

¹⁴⁸ Weiler points out that in this way the free movement rules also increase the sense of solidarity between the member states of a union. It enforces the notion of a union-wide citizenship. Joseph H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219 (1995).

¹⁴⁹ MADURO, *supra* note 141, at 173–75; TRIBE, *supra* note 41, at 1054.

¹⁵⁰ Donald H. Regan, *Judicial Review of Member-State Regulation of Trade within Federal and Quasi-Federal System: Protectionism and Balancing, Da Capo*, 99 MICH. L. REV. 1853, 1859–60 (2001).

equivalence: this leads him to assume that the local legislator is better positioned to optimize overall local interests than a federal institution would be.¹⁵¹ Therefore, in trade law disputes, the federal courts should not interfere with the local measures at all unless there is clear evidence of discrimination (or other malfunctions).¹⁵² In the absence of discrimination, the local legislature together with the market forces, will optimize regulatory policy from the viewpoint of efficiency.¹⁵³ The reason for this accords with Peterson's theory: because the local authority must pursue economic development, it cannot afford to do otherwise.¹⁵⁴ Local legislation cannot afford to be parochial, because parochialism protects ineffectiveness. This, Regan concludes,¹⁵⁵ shows that protectionism completely undercuts the representation theory.¹⁵⁶

It would seem that in cases where the local legislator or regulator has indeed determined the economic (and other, e.g., environmental) consequences of a measure correctly, and enacted rules in an evenhanded manner, Regan's theory may well hold. But it seems less clear how Regan's analysis accords with *national*-level economic considerations of whether a measure, effective in view of an individual operator or the local level, is also effective from the perspective of the *entire union*. If the economic burden predominantly spills over outside of the locality, is the interest representation still neutral and ubiquitous? Using the example of extended producer responsibility will decision-makers give due weight to the absolute costs of a non-resident producer in collecting and separating waste if they decide to shift from a tax-funded municipal waste collection system to such a privately funded model? Doubts may further be raised on whether such local economic development policies will lead to optimal, or even acceptable, solutions in terms of *aggregate welfare* in the state and federal economy.¹⁵⁷

Some federal supervision thus may occasionally be necessary—even if the questioned measure may appear non-discriminatory, and even if it had followed a seemingly unbiased process. It is not contested that this sometimes leads to difficult value judgments. But if an out-of-state

¹⁵¹ *Id.* at 1858–59.

¹⁵² *Id.* at 1871.

¹⁵³ *Id.* at 1859.

¹⁵⁴ *Id.* at 1861–62.

¹⁵⁵ *Id.* at 1859–61.

¹⁵⁶ Regan, *supra* note 150, at 1859–61.

¹⁵⁷ See Harold Wolman & David Spitzley, *The Politics of Local Economic Development*, 10 ECON. DEV. Q. 2, 115–50 (May 1991).

participant to a local market feels that there is an unwarranted hindrance, and that the market is therefore no longer working efficiently from the perspective of local, state or national-level economics, should there *never* be a case for a judicial trade analysis of the importer's concern? That does not seem justified, and could also be contradictory to the local economic development goals on the longer term. A requirement to label a product in a city-specific fashion for end-of-life take-back could be an example, although non-discriminatory and potentially efficient on city-level, the fragmentation created by the multitude of similar environmental labels could create considerable inefficiencies for producers' and waste handlers' systems on the national level. A careful analysis by the federal judiciary seems meritorious in determining whether or not the local labeling requirement is excessive from a national perspective because there may exist less trade restrictive alternatives to reach the city's environmental objective.¹⁵⁸ On the other hand, the Court should avoid challenging the political judgment that the environmental objective itself represents: a strict proportionality test that juxtaposes the environmental benefits with the trade hindrance is merited in extreme cases only.

E. Eclectic Approach

Peterson reminds us that his theory does not advocate a complete renouncing of the other strains of local political theory such as the doctrines of power structures, pluralist decision-making, and invisible political elites.¹⁵⁹ A more convincing portrait of the local political landscape emerges when various (public choice) doctrines may be combined together.¹⁶⁰ Similarly it would appear that, in drawing the formal constitutional limits, a complete abandonment of the political representativeness theory of trade law is not called for despite the above criticism, and even if much of Regan's reasoning were followed. The representativeness theory may be applied in conjunction with the discrimination and obstacle trade law tests to refine the picture.

¹⁵⁸ For some examples of judicial assessments of this type of subnational labeling scheme, see *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001); *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333 (1977).

¹⁵⁹ PETERSON, *supra* note 16, at 5.

¹⁶⁰ Separately these three theories may be poorly applicable: for instance, Peterson claim that the local politics is not easily affected by the pressure groups. PETERSON, *supra* note 16, at 109.

IV. CITY-LEVEL ENVIRONMENTAL POLICY-MAKING IN A GLOBAL ECONOMY

The political-economic theory of Paul E. Peterson describes “informal” limits on city level policies.¹⁶¹ Parallel to the “informal” limits are constitutional law limits of a more “formal” kind.¹⁶² Overall, that paper attempts to provide insights on whether these informal and formal limits to city-level policies prevent the cities from having an active role in environmental policy-making.¹⁶³ The overall conclusion of the paper’s study on the boundary case of extended producer responsibility is that, at least in the context of EPR, such informal and formal limits are not overly constraining.¹⁶⁴

One of the main presumptions of Peterson in *City Limits* was not to confuse localities for nation-states, but instead acknowledges the specific external constraints of *local* politics.¹⁶⁵ However, it would seem that the distinction between the local authorities and nation states has shrunk considerably during the thirty years since *City Limits* was written. Cities and large metropolitan areas increasingly dominate national economies.¹⁶⁶ This has not come to mean, however, that local authorities’ external limits to act have become any lesser—they have not. As many cities have grown into international actors, the informal, political city limits are now drawn on a global map. The tentacles of the global economy now extend their restrictive effects also to nation-states’ ability of independent policy-making. The large metropolises and nation-states are equally directed by a relentless drive for superior competitiveness. This makes interpretations of Peterson’s theory regarding local authorities’ limits acute and relevant. Because application today, in assessing the limits to modern societal policies, such as extended producer responsibility, on many different levels of governance.

Considering the shrinking distinctions between cities and nation-states in terms of public choice, there would intuitively appear to be little reason for a differentiated approach in terms of the constitutional Dormant Commerce Clause analyses. The fact that cities have become global players only reinforces this thought, because the economic imperative of free trade is essentially of international pedigree itself. For example, the rules of the U.S. internal market are to a large extent similar to those of the

¹⁶¹ *Id.*

¹⁶² *Id.* at 28, 34.

¹⁶³ See generally PETERSON, *supra* note 16.

¹⁶⁴ See generally *id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Schragger, *supra* note 3, at 504–05.

WTO and EU.¹⁶⁷ A scrutiny of the local measures should follow the tenets of, theories such as, non-discrimination and non-protectionism, free inter-jurisdictional mobility, or a common national market. These principles have been defended by judicial progressives and conservatives alike in terms of the Dormant Commerce Clause.¹⁶⁸ This Article shows how an understanding of the local economics and politics, which Peterson's theory illuminates, helps in achieving these overarching principles. Judicial intervention can be efficient and effective; to mute unhealthy tendencies in the city-business relationships, while preserving the city's ability to fill in gaps in environmental policy-making.¹⁶⁹

CONCLUSIONS

A. *City Limits Meet the Dormant Commerce Clause—Experiences from the Viewpoint of EPR*

So what is the relationship between EPR—a paradigmatic case of modern environmental law at a local level—and Peterson's theory and the Dormant Commerce Clause? Overall, cities would seem rather uninhibited from the perspective of Peterson's theory or the Dormant Commerce Clause to actively drive EPR. Discrimination of *non*-local producers in favor of local producers is not inherent in, nor a prerequisite for, successful EPR. The Courts have followed a lenient view in allowing non-discriminatory local environmental measures. Subfederal jurisdictions are also usually allowed to enact laws where the benefits of such laws fall unequally between different vertical levels of the value chain, even if the local industry would be predominantly on the benefitting level.¹⁷⁰ Such laws have not been considered unconstitutional.¹⁷¹ Similar vertical aspects in the division of the extended producer responsibilities thus do not appear to render

¹⁶⁷ See KALIMO, *supra* note 70 (describing the similarities between European and American internal market rules).

¹⁶⁸ Schragger, *supra* note 3, at 532. Such uniformity has not been the case so far in other areas of constitutional law. The constitutional scrutiny of cities' economic development and other policies should be consistent also under, for example, the Takings Clause and the Privileges and Immunities Clause. *Id.*

¹⁶⁹ In fact, to the extent that public choice theory can also effectively be applied to positive commerce clause theory, which determines the scope of state and federal authorities' powers; it would further increase of theoretical coherence across fields. See, e.g., Adam Badawi, *Unceasing Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 CAL. L. REV. 1331 (2001).

¹⁷⁰ See, e.g., *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978).

¹⁷¹ *Id.* at 133–34.

EPR particularly or inherently vulnerable to a Dormant Commerce Clause challenge. Any extraterritorial impacts of EPR are, in line with recent case law on the matter,¹⁷² too indirect and obscure to have relevance for a local ordinance's constitutionality. EPR does not normally dictate a specific process or production method for a product, for example.

Neither does Peterson's vision of the informal limits to city policies, created by stakeholders voting with their feet, seem dispositive to the outcome of our analysis in terms of EPR. By making producers responsible for end of life management of products, a city shares the burden of waste management between local residents and businesses across the globe. Should an EPR scheme however be implemented in a clearly protectionist manner—which, as stated, EPR itself does not in any way endorse or necessitate—it would appear to go against Peterson's rationale. Economic development cannot in the long term be promoted by protectionist policies. Vice versa, if a local economic development measure (à la Peterson) contains interstate trade distorting *protectionist* elements, its probability of surviving a Dormant Commerce Clause scrutiny is low. Economic criteria are usually *ineligible* as grounds of justification. Only essential *non-economic* social objectives qualify as justifications. It may at first sight seem awkward that economic development measures, which are the privileged type under Peterson's theory, are amongst the least likely to survive a trade law *justification* test. This is nevertheless, on closer scrutiny, not problematic because sustainable economic development may—and indeed should—be in any event pursued through a nonprotectionist agenda. Otherwise, both the economy and the environment end up worse off.

While the Dormant Commerce Clause mainly acts as a means to root out protectionism, could its practical application also raise issues in terms of *non-discriminatory* measures? Certain procedural handicaps do need to be acknowledged. First, the industrial interests that have triggered the trade concern may be backed by superior financial resources. This may influence the parties' ability to engage in, and to win, a legal battle in cases of non-discriminatory measures.¹⁷³ Furthermore, the allocation of

¹⁷² See, e.g., *Pharm. Research & Mfrs. of Am. v. Co. of Alameda*, 967 F. Supp. 2d 1339 (N.D. Cal. 2013); see also *Rocky Mountains Farmers Union v. Corey*, 740 F.3d 1070, 1106 (9th Cir. 2013) (holding that “[t]he Commerce Clause does not protect Plaintiffs’ ability to make others pay for the hidden harms of their products merely because those products are shipped across state lines. The Fuel Standard has incidental effects on interstate commerce, but it does not control conduct wholly outside the state.”).

¹⁷³ See *KALIMO*, *supra* note 70, at 47. Compare *Maine v. Taylor*, 477 U.S. 131 (1986) (a rare case where a facially discriminatory environmental state measure was upheld) with *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

the burden of proof in cases may influence the outcome. Once the plaintiff importer has proven an obstacle to trade exists, it is for the defending city or state to show that the environmental concern justifying the measure is legitimate. After that, the burden shifts back to the plaintiff to allege that the non-discriminatory local measure taken to address the concern is clearly excessive and not the least trade-restrictive alternative available. Because it is often so demanding to scientifically prove that a particular measure, in this case an alternative to EPR, is unequivocally equal (or better) in terms of the environment, the party bearing the burden of proof is in a weaker position. This is usually the fate of the importer, and could be so even in cases involving facially discriminatory local measures. Determining the exact allocation of the burden of proof may however be intricate and case specific.¹⁷⁴

B. *Combining Theories for a Wiser Practice*

Obviously the highly complex practical circumstances of many current societal issues tend to make fully accurate, normative, and predictive generalizations about the fate of city level environmental measures in judicial cases challenging.¹⁷⁵ Indeed, perhaps the most important implication of the parallels identified in this analysis between Peterson's theory and the Dormant Commerce Clause is that, while they do not seem to constrain cities' ability to environmental policy-making, they can offer mutually supportive insights on the judicial and political value reconciliation conundrums that such city level decisions may entail. The parallels

¹⁷⁴ *Hughes*, 441 U.S. at 336.

¹⁷⁵ To give a waste management related example of the challenging lines one needs to draw across this quagmire, the Supreme Court has tried to answer the question whether it is legitimate for a state to support a local waste treatment facility by mandating waste flows originating in the state to be directed to that facility. A divided Court decided in *Carbone* that it is not, yet came, equally divided, to the opposite conclusion in *Oneida* thirteen years later. Compare *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 401 (1994) with *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007). The facility in *Carbone* was a private company and in *Oneida* a state-created public benefit corporation. Whether that fact actually was for the justices the distinguishing factor, or whether it should constitute such distinguishing factor, remains uncertain. Was there discrimination involved, and to what extent did that play a role in the Court's assessment, explicitly or in the background? The Court's majority considered the Clarkstown's requirement in *Carbone* discriminatory, but used the more lenient *Pike* balancing test of non-discriminatory measures in comparing the environmental and economic implications in *Oneida*—as Justice O'Connor had already advocated in her concurring opinion in *Carbone*. *C&A Carbone*, 511 U.S. at 401 (O'Connor J., concurring).

between trade law's justification test and Peterson's theory are particularly clear in the determination of whether there exist any local measures, which offer an equal level of environmental protection, but with less trade-constraining effects. These "least restrictive measures" tests will guide policies into a positive direction in terms of economic development, in particular considering that the tests appear to be more lenient for evenhanded measures than they are for *de jure* or *de facto* discriminatory measures. However, the tests should not limit the societal objectives of the policy itself. When properly applied, the tests do not affect the city's choice in terms of the level of environmental protection it chooses. Instead, it focuses on the means of reaching that level with as little intrusion to trade as possible—which is in fact only a means of rooting out origin-based discrimination or *avoidable* hindrances—yet does not imply that intrusions as such are prohibited.

C. *Thinking Under the Box*

The intersection of public choice theory and legal doctrine is both interesting and important. There are, however, also concrete reasons to explore the limits to the environmental policy-making prerogatives of cities. And it is not just the ongoing political stalemate at the national level in the United States that prompts a careful look at these questions. Notably, more than half of the world's population now lives in urban areas, so the growing role of cities in the world economy and in climate-related policy motivates this analysis. We chose to investigate the role of a type of environmental policy that differs from the classic interest of local governments in land use and basic public health. EPR is interesting in that respect because it reflects the prioritization of preventative measures over end-of-pipe approaches; it leverages life cycle thinking,¹⁷⁶ and it exemplifies the move from command and control towards economic and informational policy instruments. All this promises more flexibility in achieving a given set of policy objectives.¹⁷⁷ The rising importance of cities and evolving approaches to environmental policy make the nature of cities' limits and possibilities for thinking under the box compelling.

¹⁷⁶ Life cycle thinking refers to analysis, management and policy on a cradle-to-grave basis and incorporates both life cycle assessment ("LCA") and life cycle management ("LCM").

¹⁷⁷ Naoko Tojo, *Extended Producer Responsibility as a Driver for Design Change—Utopia or Reality?* (Sept. 2004) (Ph.D. dissertation, Lund University) (on file with The International Institute for Industrial Environmental Economics, Lund University) *available at* 212.113.88.1/att/literature/2004_Extended%20producer%20responsibility_Tojo.pdf [<http://perma.cc/375A-3JG7>]; *see also* KALIMO, *supra* note 70.